No.

IN THE SUPREME COURT OF THE UNITED STATES
1983 TERM

WARREN A. WILKES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

GEORGE E. SCHUMACHER
Federal Public Defender

JAMES G. WADE
Assistant Federal Public Defender
Counsel of Record

590 Centre City Tower
650 Smithfield Street
Pittsburgh, PA 15222

(412) 644-6565
(FTS) 722-6565

QUESTION PRESENTED

I. WHETHER THE DISTRICT COURT ERRED IN NOT DISMISSING AN INDICTMENT ALLEGING A VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 912 FOR ITS FAILURE TO CHARGE AN "INTENT TO DEFRAUD"

TABLE OF CONTENTS

Page

Question Presented 1

Table of Authorities ii

Opinions Below 1

Statement of Jurisdiction 1

Statute Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

Conclusion 7

Appendix:

Opinion from the United States Court of Appeals for the Third Circuit, dated April 19, 1984 . . . . . 1a

Order Amending Opinion of the United States Court of Appeals for the Third Circuit, dated May 11, 1984 . . . . . 2a

Indictment, United States of America v. Warren A. Wilkes 3a

TABLE OF AUTHORITIES

CASES: PAGE

Hanes v. United States
164 F.2d 798 (5th Cir. 1965) 6

United States v. Cohen
631 F.2d 1223 (5th Cir. 1980). 6

United States v. Cord
654 F.2d 490 (7th Cir. 1981) 5

United States v. Guthrie
387 F.2d 569 (4th Cir. 1967) 5

United States v. Lepowitch
318 U.S. 702 (1943) 5, 6

United States v. Pitman
459 F.2d 451 (9th Cir.)
cert. denied, 409 U.S. 863 (1972). 5

United States v. Randolph
460 F.2d 367 (5th Cir. 1980) 6

United States v. Robbins
613 F.2d 1223 (8th Cir. 1979). 5

United States v. Rosser
528 F.2d 852 (D.C. Cir. 1967). 5

United States v. Rose
500 F.2d 12 (2nd Cir. 1974)
vacated on other grounds,
422 U.S. 1031-32 (1975) 5

STATUTES:

Title 18, United States Code, Section 76 (1940) 6
Title 11, United States Code, Section 912 . . . . . 2, 4
Title 18, United States Code, Section 3231. 3
Title 18, United States Code, Section 1254(1) 1

COURT RULES

United States Supreme Court Rules
Rule 22.4 1
Rule 29.1 1

OPINIONS BELOW

No opinion was written by the United States District Court for the Western District of Pennsylvania.

An opinion was written by the United States Court of Appeals for the Third Circuit and is set forth in the appendix at 1a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered the judgment sought to be reviewed on April 19, 1984, affirming petitioner's conviction in the United States District Court for the Western District of Pennsylvania.

Section 1254(1) of Title 28, United States Code, confers jurisdiction upon the United States Supreme Court to review the final judgment of the Third Circuit Court of Appeals by writ of certiorari. Pursuant to Rule 20.4 and 29.1 of the United States Supreme Court, the time for filing a petition for writ of certiorari began to run on April 19, 1984 and expires on June 18, 1984.

STATUTE INVOLVED

Title 18, United States Code, Section 912:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

STATEMENT OF THE CASE

Warren A. Wilkes appealed to the United States Court of Appeals for the Third Circuit from a Judgment of Conviction and Sentence entered against him following a jury trial in the United States District Court for the Western District of Pennsylvania. The United States District Court had subject matter jurisdiction pursuant to Title 18, United States Code, Section 3231.

The indictment charged 11 counts. Count one alleged Wilkes violates Title 18, United States Code, Section 912, by falsely pretending and assuming to be an officer and employee of the United States, a social security administration employee, and that acting under the authority thereof had taken upon himself to act as such. (Appendix at 3a).

Counts 2 through 11 alleged Wilkes, on ten specific occasions, did falsely pretend to be a social security administration employee, and that in such a pretended character, did obtain certain sums of money from Raymond Bender. (Appendix at 3a).

On December 9, 1982, Joseph Bender, a brother of Raymond Bender, wrote a complaint to the Federal Bureau of Investigation concerning an alleged social security fraud. In the complaint, Joseph Bender stated that a Warren A. Wilkes was impersonating a social security administrator employee in collecting money from his brother, Raymond Bender, as overpayments of social security benefits.

After receiving the complaint, the F.B.I. interviewed Raymond Bender. Following the interview, the F.B.I. contacted Raymond Bender to sign a consent form for the installation of a tape recording device on his telephone. On December 20, 1982 Raymond Bender had a telephone conversation with Warren A. Wilkes which was recorded and introduced at the trial. According to the telephone call, Wilkes was to stop by the residence of Raymond Bender on December 21, 1983. Wilkes arrived at Raymond Bender's house on December 21, 1983 and picked up $50.00 from Raymond Bender. After receiving the money, the F.B.I. arrested Wilkes outside the Bender residence.

A jury trial commenced on March 14, 1983 in the United States District Court for the Western District of Pennsylvania. After the Government rested its case, defense counsel moved to dismiss the indictment for failure to charge an "intent to defraud" in any of the counts. The trial court denied the motion and later concluded that the intent to defraud is not an element of the offense charged by Title 18, United States Code, Section 912.

The trial concluded on March 16, 1983 when the jury returned a verdict of guilty on all counts. On April 18, 1983, Wilkes was sentenced to 18 months under count one; 18 months under count two, to run concurrently with count one, and the trial court suspended imposition of sentence on counts three to eleven. Wilkes filed a timely notice of appeal from that judgment. Wilkes is currently on bond pending this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT ERRED IN NOT DISMISSING AN INDICTMENT ALLEGING A VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 912 FOR ITS FAILURE TO CHARGE AND "INTENT TO DEFRAUD."

Wilkes submits that this Court should grant his Petition for Writ of Certiorari because the Third Circuit Court of Appeals has rendered a decision in conflict with the decisions of the Fifth Circuit Court of Appeals on the same matter. Wilkes also submits that the Third Circuit Court of Appeals had decided an important question of federal law which has not been settled by this Court. Further, the Third Circuit Court of Appeals has decided a federal question in a way that conflicts with the decision of this Court in United States v. Lepowitch, 318 U.S. 702 (1943).

The Circuits have split on the issue of whether an "intent to defraud" is an element of Title 18 U.S.C. 912 that must be charged in the indictment. Several circuits, along with the Third Circuit, have ruled that intent to defraud is no longer an element that need be charged in an indictment alleging violation of 18 U.S.C. 912. See United States v. Cord, 654 F.2d 490 (7th Cir. 1981); United States v. Robbins, 613 F.2d 688 (8th Cir. 1979); United States v. Rosser, 528 F.2d 652 (D.C. Cir. 1976); United States v. Rose, 500 F.2d 12 (2nd Cir. 1974), vacated on other grounds, 422 U.S. 1031-32 (1975); United States v. Mitman, 459 F.2d 451 (9th Cir.), cert. denied 409 U.S. 863 (1972); United States v. Guthrie, 387 F.2d 569 (4th Cir. 1967).

The Fifth Circuit has ruled to the contrary. See United States v. Cohen, 631 F.2d 1223 (5th Cir. 1980); United States v. Randolph, 468 F.2d 367 (5th Cir. 1972); Hanes v. United States, 344 F.2d 798 (5th Cir. 1965).

In the 1948 revision of the Criminal Code, the language "intent to defraud either the United States or any person" was deleted from 18 U.S.C. 912's predecessor statute. 18 U.S.C. 76 (1940). The controversy centers on the legislative note found at 18 U.S.C. 912 (1982). The historical or revision notes indicate that the omitted language was rendered meaningless in view of this Court's decision in Logewitch, supra.

The Circuit Court then looked to Logewitch to determine whether intent to defraud must be alleged in the indictment. The Fifth Circuit holds that the 1948 revision was not suppose to change the substance of the law. See Hanes v. United States, 344 F.2d at 801-02.

In order to resolve a conflict among the Circuits and to promote the uniformity of the interpretation of this Court's decision in United States v. Logewitch, Wilkes requests this Court to grant his Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

DATED: June 13, 1984

Respectfully submitted,

GEORGE F. SCHUMSCHER
Federal Public Defender

BY: _____
James M. Wade
Assistant Federal
Public Defender
Counsel of Record

CERTIFICATE OF SERVICE

I, James V. Wade, a member of the Bar of this Court, hereby certify that a true and correct copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit were mailed this day to the following:

The Solicitor General
of the United States
Department of Justice
Washington, D.C. 20530

Sally Mraz, Clerk
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

J. Alan Johnson
United States Attorney
633 U.S. Post Office & Courthouse
Pittsburgh, Pennsylvania 15219

Warren A. Wilkes
110 Linoleum Way
Pittsburgh, Pennsylvania 19219

DATED: June 13, 1984

GEORGE E. SCHUMACHER
Federal Public Defender

James V. Wade
Assistant Federal Public Defender
Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5301

UNITED STATES OF AMERICA

v.

WILKES, WARREN A. a/k/a John Williams

Warren A. Wilkes,

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA - PITTSBURGH
(D.C. Criminal No. 83-00006-01)

Submitted Pursuant to Rule 12(6)
January 10, 1984

Before: ALDISERT, HIGGINBOTHAM and SLOVITER,
Circuit Judges.
(Filed: April 19, 1984)

GEORGE E. SCHUMACHER
Federal Public Defender
D. PENN HACKNEY
Assistant Federal Public Defender
560 Centre City Tower
650 Smithfield Street
Pittsburgh, PA 15222

Attorneys for Appellant

RECEIVED

APR 23 1984

CLERK, U.S. COURT OF APPEALS
THIRD CIRCUIT & PENNSYLVANIA

APPENDIX 1a-1-

J. ALAN JOHNSON
United States Attorney
CONSTANCE M. BOWDEN
Assistant U.S. Attorney
RICHARD A. BACVAR
Legal Intern
633 U.S. Post Office &
Courthouse
Pittsburgh, PA 15219

Attorneys for Appellee

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*.

The defendant-appellant Warren A. Wilbes, also known as Jake Williams, appeals, *inter alia*, from a judgment of conviction and sentence of 18 months' imprisonment for false personation in violation of title 18, United States Code, section 912, 18 U.S.C. § 912. The defendant asks this court to hold that counts of an indictment are fatally defective where it is charged that a defendant "did falsely pretend and assume to be an officer and employee of the United States," and who "did falsely take upon himself to act as such" (Count 1) and who "in such pretended character did obtain" sums of money (Counts 2-11) in violation of 18 U.S.C. § 912. The defendant claims that these counts are defective because they do not specifically allege an "intent to defraud."[1]

---

1. Warren A. Wilbes raises three additional contentions. First, Wilbes argues that the district court erred in admitting into evidence Wilbes' spontaneous statements made at the time of arrest to an FBI agent expressing a willingness to make

APPENDIX 10-2

The question of whether a criminal indictment need expressly allege an "intent to defraud" to make out a section 912 offense has not been considered before by this court. We hold that the indictment need not allege an intent to defraud and thus we align this court with the majority of courts of appeals on this issue. We therefore will affirm the conviction and sentence below.

I.

The evidence presented at trial established that on several occasions, the defendant, Warren A. Wilkes, claimed he was a Social Security Administration employee and collected money from Raymond Bender ("Bender"), a 62-year-old disabled veteran, as alleged overpayments in the disability benefits Bender was receiving from the Social Security Administration. According to the government's evidence, the defendant contacted Bender by telephone on September 7, 1982 and identified himself as Jake Williams, an employee of the Social Security Administration, who was calling on behalf of Warren A. Wilkes. The defendant informed Bender that Bender had received an excess of $160 in disability benefits which he was required to repay in order to remain eligible for future benefits. The defendant indicated that he would collect the "overpayment" the following day.

The evidence further establishes that on September 8, 1982, the defendant arrived at the

---

institution. Second, Wilkes maintains that the district court erred in refusing to take judicial notice of the definition of schizophrenia and accordingly instructing the jury.
Finally, Wilkes asserts that it was plain error for the district court to admit into evidence a taped telephone conversation obtained without a voluntary consent.
Having considered the record before us carefully and the applicable law, we hold that these arguments have no merit and do not warrant any discussion.

APPENDIX 1a-3

Bender residence, identified himself as Jake Williams from the Social Security Administration and requested Bender to give him checks totaling $160 payable to Warren A. Wilkes. The defendant repeated this procedure on numerous occasions and demanded repayment of alleged overpayments in amounts ranging from $50 to $125.

Mr. Joseph Bender, Raymond Bender's brother, suspicious of Jake Williams, ultimately filed a complaint with the Federal Bureau of Investigation ("FBI"). FBI agents interviewed Raymond Bender and recorded a December 20, 1982 telephone conversation between the person identifying himself as Jake Williams and Raymond Bender, having obtained Bender's prior consent to do so. During the course of the conversation, the caller told Bender that he had to repay a sum of $50. The following day, the defendant arrived at Mr. Bender's residence, claiming to be Jake Williams. He collected the $50 and was arrested on the scene by FBI agents.

At the conclusion of the government's case, the defendant moved to dismiss the indictment for failure to charge "intent to defraud" in any of the eleven counts. The trial court denied the motion, concluding that intent to defraud need not be specifically alleged. The trial court determined that although the indictment did not specifically allege an intent to defraud, it charged in the exact terminology of the statute that the defendant pretended to be an employee of the United States acting under the authority thereof, that the defendant acted as such and that in such pretended character demanded and indeed obtained money from Raymond Bender in violation of section 912. Therefore, the trial court concluded that it was unnecessary for the indictment to allege an intent to defraud.

The jury returned a verdict of guilty on all counts from which the defendant appeals.

APPENDIX 1a-4a

II.

The defendant reserves on this appeal his assertion that a specific intent to defraud is a necessary element of the offenses prohibited by section 912. Apparently the basis for this position is found in the fact that the offense of falsely personating an officer or employee of the United States expressly required an "intent to defraud" in the statute as originally enacted in 1866:

> Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, or under the authority of any corporation owned or controlled by the United States, and [1] shall take upon himself to act as such, or [2] shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, or any corporation owned or controlled by the United States, any money, paper, document, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

18 U.S.C. § 76 (1940)(emphasis added).[1] This provision remained unchanged until the penal code was revised in 1948.

---

1. For the sake of convenience and clarity of discussion, we will adopt the practice of other courts of inserting bracketed numerals to distinguish between the separate offenses contained in this provision. Section 912 specifies two distinct crimes: clause [1] makes it an offense to pretend to be an officer or employee of the federal government and to act as such while clause [2] prohibits the demanding of and the obtaining of any money, paper, document or thing of value while in such pretended character. See e.g. United States v. Rosen, 520 F.2d 852, 854 n.4 (D.C. Cir. 1975).

APPENDIX 1a-5a

In the 1948 revision of the criminal code, the language "intent to defraud" was deleted from the statute and that section was recodified as section 912, 18 U.S.C. § 912. As revised, section 912 now reads:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, [1] and acts as such, [2] or to such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

18 U.S.C. § 912 (1982).[3]

The only explanation for the deletion is provided in the Historical or Revision Notes: "The words 'with the intent to defraud the United States or any person' contained in said section 76 of Title 18, U.S.C., 1940 ed., were omitted as meaningless in view of United States v. Lepowitch (Lepowitch), 318 U.S. 702 (1943)." Legislative Note, 18 U.S.C. § 912 (1982). We thus turn to the 1943 Supreme Court decision of United States v. Lepowitch, 318 U.S. 702 (1943), in order to determine how the phrase "intent to defraud" became meaningless in light of that decision.

In Lepowitch, the defendants pretended to be FBI agents in order to obtain information concerning another individual's whereabouts. The trial court sustained a demurrer to the indictment which charged the defendants with a violation of section 76, reasoning that the defendants' conduct, "'while highly reprehensible, does not come within the terms of the statute,'" and concluded that count one of indictment did not adequately allege either impersonation or

---

3. See note 2 supra.

APPENDIX 10-6

acting with intent to defraud. The government did not seek review of the district court's ruling on count two which was based on part [2] of section 76. *Id.* at 703 (quoting *United States v. Lepoutich*, 48 F.Supp. 846, 847 (1942)).

The Supreme Court reversed. The Court compared the two clauses of section 912 and reasoned that clause one, the only one in consideration in *Lepoutich*, concerned the "deceitful attempt to affect the course of action of another" whereby a person could be defrauded without having parted with something of measurable value. *Id.* at 704. Clause two, on the other hand, was construed in dictum as requiring something more, as in the nature of an intent to obtain a "valuable thing." *Id.* at 705. As to the indictment, the Court reasoned that had "the statutory language . . . alone been used, the indictment would have been proof against demurrer . . . ." *Id.* at 704.

The Supreme Court held that "the words 'intent to defraud' in the context of this statute, do not require more than the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." *Id.* In our view it is this definitional statement which purportedly rendered the earlier requirement of an "intent to defraud" "meaningless" in the minds of the revisers of this section of the criminal code.

In the present case, with this background in mind, we must decide whether an express allegation of fraudulent intent is required in order to charge a violation of 18 U.S.C. § 912.

It is the defendant's position that, even though Congress dropped this language from the statute when it was revised in 1948, "intent to defraud" is still an essential element of a section 912 violation and must be expressly alleged in the indictment or the

APPENDIX 10-7

indictment is invalid. In support of his position, the defendant urges this court to adopt the Fifth Circuit's interpretation of the holding in *Lepowitch* and the legislative intent regarding the 1948 penal code revision.

The Fifth Circuit adheres to the precept that "intent to defraud" remains an element of the crime of falsely personating a federal officer or employee and must be charged in the indictment as to either section 912[1] or section 912[2]. Because the words of the statute are viewed as omitting an essential element of the offense, the Fifth Circuit requires that the indictment supply it with certainty. *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980)(section 912[1] offense); *United States v. Randolph*, 460 F.2d 367 (5th Cir. 1972)(section 912[1] offense); *Hanon v. United States*, 344 F.2d 796 (5th Cir. 1965)(section 912[2]).

The Fifth Circuit stands alone in its interpretation of the requirements of indictments alleging violations of section 912[1] and [2]. All of the other six circuit courts of appeals which have considered this issue disagree with the Fifth Circuit's interpretation of *Lepowitch* and the subsequent penal code revision. Specifically, recent decisions in the District of Columbia, Second, Fourth, Seventh, Eighth and Ninth Circuits have held that an indictment alleging a violation of either section 912[1] or 912[2] need not charge a specific intent to defraud to be sufficient.

In *United States v. Guthrie*, 387 F.2d 569 (4th Cir. 1967), the Fourth Circuit did not consider the congressional change as inadvertent due to a misunderstanding of *Lepowitch*. The court interpreted the 1948 revision of Section 912 to mean that intent to defraud was no longer an element of the false personation statute and need not be alleged in an indictment or proved at trial. The *Guthrie* defendants had impersonated federal bank examiners in violation

APPENDIX 1a-8

of part (1) of section 912. The court reasoned that whether or not the amendment was in fact necessitated by the Supreme Court's holding in *Lepowitch*, Congress apparently accepted the Reviser's view and thus relied upon the "accepted canon of statutory construction that where Congress has advertently changed the legislative language the change must be given effect" to support the conclusion that intent to defraud is no longer an element under section 912(1). *United States v. Guthrie*, 387 F.2d at 571. The deletion of the intent language amounted to a recognition that "the injury to the federal government is occasioned by masquerading and acting as a government official regardless of fraudulent intent." *Id.*

The *Guthrie* rationale, although applied in the context of a section 912(1) violation and expressly rejected by the Fifth Circuit in *United States v. Randolph*, 460 F.2d at 370, has been followed and modified by other circuits as well as expanded to include offenses under 912(2). The common thread in these decisions is that the analysis of *Lepowitch* and the subsequent legislative revision in 1948 is directly contrary to the Fifth Circuit's approach. *See United States v. Cord*, 654 F.2d 490 (7th Cir. 1981)(section 912(2)); *United States v. Robbins*, 613 F.2d 688 (8th Cir. 1979)(section 912(2)); *United States v. Rosser*, 528 F.2d 652 (D.C.Cir. 1976)(section 912(1)); *United States v. Rose*, 500 F.2d 12 (2d Cir. 1974)(section 912(2)); *United States v. Witman*, 459 F.2d 451 (9th Cir. 1972)(section 912(2)).

In the case of *United States v. Rosser*, 528 F.2d 692 (D.C.Cir. 1976), the court held that an indictment sufficiently charged that the defendant acted as an Internal Revenue Service employee in violation of section 912(1) even though the indictment did not charge that the defendant did so with an intent to defraud. The approach of the District of Columbia

APPENDIX 1a-9-

Circuit in that case has been followed in other cases involving section 912[1] offenses which have held that "intent to defraud" is not an essential element.

The District of Columbia Circuit attempted to reconcile the divergent rationales of *Hanes* and *Guthrie* in *Rosser*. The *Rosser* court agreed with the Fifth Circuit's interpretation of *Lepowitch* in *Randolph* to the extent that *Lepowitch* did not hold that an allegation of intent to defraud was unnecessary but framed the issue before it as "whether intent to defraud as defined by *Lepowitch* could reasonably have been considered by Congress to be present whenever the elements retained in the 1948 revision are proven." 328 F.2d at 655 n.13. In attempting to reconcile the conflicting interpretations of congressional intent, Judge Skelly Wright articulated the following rationale and approach:

> We agree with the Fifth Circuit that Congress did not intend to increase the scope of the false personation statute by adopting the revisers' draft of Section 912. We also agree with the Fourth Circuit that courts should be extremely hesitant to read back into the statutory definition of a crime words specifically excised by Congress. Fortunately, these conclusions are not irreconcilable.
>
> The crime defined by Section 912[1] has two elements: falsely pretending to be an officer or employee of the United States, and acting "as such." If acting "as such" is understood to mean performing an overt act that asserts, implicitly or explicitly, authority that the impersonator claims to have by virtue of the office he pretends to hold, the concerns of both the Fifth and Fourth Circuits can be accommodated. Attempting to exercise pretended authority is far more offensive to the interests of the United States than is "mere

> bravado." Moreover, it seems reasonable for Congress to have concluded that virtually everyone who pretends to be an officer or employee of the United States and to some manner asserts authority by acting "as such" seeks "to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." United States v. Lepowitch, supra, 318 U.S. at 704, 63 S.Ct. at 916. Thus elimination of intent to defraud as an element of the crime defined by Section 912[1] does "not overrule Lepowitch by relegislation or * * * modify the substance of the provision." Nunez v. United States, supra, 344 F.2d at 802.
>
> Our understanding of the meaning of "acts as such" in Section 912[1] explains the reviewers' use of the word "meaningless"--after *Lepowitch* the intent to "defraud" requirement is surplusage.

Id. at 656 (footnotes omitted). Congress thus recognized that the words "intent to defraud" were meaningless since intent to defraud as defined by the Supreme Court in Lepowitch would be present whenever the element "acting as such" was proven. Accord, United States v. Robbins, 613 F.2d 688, 690-92 (6th Cir. 1979).

Unlike section 912[1], as the Lepowitch Court indicated by way of dictum, section 912[2] requires more than an exertion of pretended authority to complete the crime. The offense is committed if an impersonator demands or obtains something of value in the guise of a federal officer or employee rather than in some other capacity unrelated to the false personation. See United States v. Cord, 694 F.2d at 492. In Cord, the defendant obtained $6,000 on the pretext of conducting an FBI investigation and the Seventh Circuit stated that:

APPENDIX 10-11

> where one is deceived into giving up something of value, as required by the second part of the statute. It is even more implausible that the purpose is pure. Thus there need be no allegation of fraudulent intent since allegation of acts sufficient to violate part two would satisfy the Lepowitch definition.

Id. (emphasis added). Thus, "[t]he requirement of § 912[2] that the money or thing of value be demanded or received in 'pretended character' adequately covers the possibility raised by the Lepowitch definition that the impersonation did not affect the actions of the person deceived." United States v. Rose, 500 F.2d at 16, vacated on other grounds, 422 U.S. 1031-32 (1975).

The overwhelming weight of the authority thus goes against the conclusion of the Fifth Circuit and the approach advocated by the defendant. As the Eighth Circuit remarked in United States v. Robbins, 613 F.2d at 691, we too "question the wisdom of requiring that an indictment allege an 'intent to deceive' when the reviser's note to the statutory change indicated that the words were rendered 'meaningless' by a decision of the United States Supreme Court." Moreover, we are mindful of the District of Columbia Circuit's admonition that "courts should be extremely hesitant to read back into the statutory definition of a crime words specifically excised by Congress." United States v. Russell, 528 F.2d at 656; See United States v. Guthrie, 387 F.2d 569 (4th Cir. 1967).

We believe that "intent to defraud" as defined by Lepowitch could reasonably have been considered by Congress to be present whenever the elements retained in section 912 are proven, and thus we hold that an indictment alleging violations of title 18, United States Code, section 912[1] or [2] need not specifically allege an intent to defraud. An intent to defraud as defined in Lepowitch is present for a section 912[1] offense

APPENDIX 1a-12

whenever the element "acting as such" is proven and need not be specifically alleged. Similarly, an intent to defraud is present for purposes of a section 912[2] offense whenever one demands or receives money or a thing of value in "pretended character," acting under the authority of the United States. Thus, we conclude that the statutory language contains the necessary elements of the offense and an indictment alleging all of the necessary elements is sufficient. Russell v. United States, 369 U.S. 749, 763-64 (1962); United States v. Brandon, 601 F.2d 1251, 1258 (3d Cir. 1979).

III.

Having determined that a criminal indictment charging a violation of section 912 need not allege a specific intent to defraud, we will now examine the indictment in question to determine whether it is sufficient.

Count I of the indictment in issue charged the defendant with a section 912[1] offense. Specifically, it charged: "WARREN A. WILKES, a/k/a Jake Williams, did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is, an employee of the Social Security Administration, and did falsely take upon himself to act as such."[6] Counts II through III charged

---

6. Count I of the indictment charges that:

> Between on or about the eighth day of September, 1982 and on or about the twenty-first day of December, 1982, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. WILKES, a/k/a Jake Williams, did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is, an employee of the Social Security Administration, and did falsely take upon himself to act as such, in that he falsely identified himself to Raymond Gordon as an employee of the Social Security Administration and falsely informed him that payments of Social Security benefits had been made to him in

APPENDIX 10-13

the defendant with a section 912(2) offense. Specifically, those counts charged that "William A. Wilkes, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $60.00, [$100.00, $100.00, $100.00, $60.00, $125.00, $64.00, $64.00, $50.00, and $50.00] from Raymond Bender."[4] We conclude that because the statutory language contains all of the necessary elements of the offense and because the indictment tracks the statutory language the indictment is sufficient to withstand defendant's challenges. The government thus met the burden of proof.

We therefore will affirm the judgment and sentence below.

---

excess of the amounts to which the said Raymond Bender was lawfully entitled.

In violation of Title 18, United States Code, Section 912. Appendix at 1a.

4. Counts II through XI of the indictment charged that on or about September 8, 1982, September 10, 1982, September 13, 1982, September 14, 1982, September 15, 1982, September 16, 1982, December 7, 1982, December 10, 1982, December 15, 1982 and December 21, 1982, "William A. Wilkes, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $60.00, [$100.00, $100.00, $100.00, $60.00, $125.00, $64.00, $64.00, $50.00, and $50.00] from Raymond Bender in violation of Title 18, United States Code, Section 912." Appendix at 1a-2 to 1a-11.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX 1a-BL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5301

UNITED STATES OF AMERICA

v.

WILKES, WARREN A. a/k/a John Williams

Warren A. Wilkes,

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA - PITTSBURGH
(D.C. Criminal No. 83-00006-01)

Submitted Pursuant to Rule 12(6)
January 10, 1984
Before: ALDISERT, HIGGINBOTHAM and SLOVITER,
Circuit Judges.
(Filed: April 19, 1984)

ORDER AMENDING OPINION

The court having discovered that the slip opinion prepared by the printer does not conform with the original opinion filed April 19, 1984, it is ORDERED that the slip opinion be corrected as follows:

Page 6, 2nd line from bottom above footnote -- insert the word "the" to read: count one of the indictment

APPENDIX 2a-1

Page 7, 17th line from bottom -- insert the word "that" to read: more than that the defendants

Page 8, 9th line from top -- correct spelling of last word to read: section

Page 8, 17th line from top -- insert the word "elbow" after "91222" to read: (5th Cir. 1965)section 91222 elbow).

Page 9, 4th line from top -- the first letter of "Reviewer's" should be written in lower case to read: reviewer's

Page 9, 20th line from top -- insert the word "section" after "under" to read: under section 91222.

Page 9, 22nd line from top -- replace the word "to" with the word "are" to read: 1948 are directly

Page 11, 13th line from bottom -- the citation "F.22nd" should read: F.2d

Page 14, last line of footnote 5 -- the phrase "Appendix at 1a-2 to 1a-11." should be placed two spaces below the line, section 912.", and flush with the left margin to read

section 912."

Appendix at 1a-2 to 1a-11.

BY THE COURT:

A. Leon Higginbotham, Jr.

Circuit Judge

DATED: May 11, 1984

APPENDIX 2a-2

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX 3a-3b

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	Criminal No. 58-66
v.	18 U.S.C., Section 912
RAYMOND A. WILKES, a/k/a John Williams	

The Grand Jury charges:

Between on or about the eighth day of September, 1962 and on or about the twenty-first day of December, 1962, at Pittsburgh, in the Western District of Pennsylvania, RAYMOND A. WILKES, a/k/a John Williams, did falsely pretend and assume to be an officer and employee of the United States acting under the authority thereof, that is, an employee of the Social Security Administration, and did falsely take upon himself to act as such, in that he falsely identified himself to Raymond Bender as an employee of the Social Security Administration and falsely informed him that payments of Social Security benefits had been made to him in excess of the amounts to which the said Raymond Bender was lawfully entitled.

In violation of Title 18, United States Code, Section 912.

6

APPENDIX 3a-1

COUNT TWO

The Grand Jury further charges:

That on or about the eighth day of September, 1961 at Pittsburgh, in the Western District of Pennsylvania, Eudora A. Elliott, a/k/a Jane Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $60.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-2.

COUNT THREE

The Grand Jury further charges:

That on or about the ninth day of September, 1993, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. GILLESS, a/k/a John Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $100.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-3-

COUNT FOUR

The Grand Jury further charges:

That on or about the thirteenth day of September, 1962, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. WILKES, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $100.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-4a

COUNT FIVE

The Grand Jury further charges:

That on or about the fourteenth day of September, 1982, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. WILKES, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $100.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-5.

COUNT SIX

The Grand Jury further charges:

That on or about the fifteenth day of September, 1982, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. WILKES, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $60.00 from Raymond Tender.

In violation of Title 18 United States Code, Section 913.

APPENDIX 3a-6

COUNT SEVEN

The Grand Jury further charges:

That on or about the sixteenth day of September, 1981, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. WILKES, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $125.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-2

COUNT EIGHT

The Grand Jury further charges:

That on or about the seventh day of December, 1982, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. WILKES, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $64.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-2

COUNT NINE

The Grand Jury further charges:

That on or about the tenth day of December, 1962, at Pittsburgh, in the Western District of Pennsylvania, [redacted] WILKES, a/k/a Jake Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $66.30 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-9

COUNT TEN

The Grand Jury further charges:

That on or about the fifteenth day of December, 1962, at Pittsburgh, in the Western District of Pennsylvania, [redacted] A. WILKES, a/k/a Jane Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $50.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

APPENDIX 3a-10

COUNT ELEVEN

The Grand Jury further charges:

That on or about the twenty-first day of December, 1981, at Pittsburgh, in the Western District of Pennsylvania, WARREN A. WILSON, a/k/a Jack Williams, did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is an employee of the Social Security Administration, and in such pretended character did obtain the sum of $50.00 from Raymond Bender.

In violation of Title 18 United States Code, Section 912.

Foreman

J. ALAN JOHNSON
United States Attorney

APPENDIX 3a-11

(continued from Page 1 if more space needed)

CHECK ONE

COUNT NO.	U.S. CODE	OFFENSE	FELONY	MINOR OFFENSE	OTH MISDE
1	1001(2	Did falsely pretend and assume to be an employee of the U.S. acting under the authority thereof, and did falsely take upon himself to act as such in that he falsely identified himself to another as an employee of the Social Security Administration and falsely informed another that payments of Social Security benefits had been made to him in excess of the amount to which he was lawfully entitled.	XX		
2 - 11	1001(2	Did falsely pretend to be an officer and employee of the U.S. acting under the authority thereof, and in such pretended character did obtain money.	XX		

I certify that, to the best of my knowledge, the above entries are true and correct.

DATE: January 18, 1983 ATTORNEY at Law: [signature]
[illegible]
Assistant U.S. Attorney

APPENDIX 3a-12